STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1423

David Rucki, et al.,
Respondents,

vs.

Deirdre Elise Evavold,
Appellant.

Filed July 15, 2019
Affirmed
Bratvold, Judge

Dakota County District Court
File No. 19AV-CV-17-1950

Lisa M. Elliott, Elliott Law Offices, P.A., Minneapolis, Minnesota (for respondents)

Paul A. Godfread, Larkin Hoffman Daly & Lindgren Ltd., Minneapolis, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Bratvold, Judge; and Klaphake, Judge.[*]

U N P U B L I S H E D O P I N I O N

BRATVOLD, Judge

Appellant challenges the district court's two-year harassment restraining order (HRO) issued against her, arguing that the HRO was unconstitutional under the First

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

Amendment as applied to the facts of this case. Because we conclude that the HRO restrains unprotected speech, we affirm.

FACTS

Relevant background to this case has been previously summarized in prior opinions of this court. Respondent David Rucki and non-party Sandra Grazzini-Rucki were married and had five children together. *See State v. Evavold*, No. A17-0200, 2017 WL 4583235, at *1 (Minn. App. Oct. 16, 2017), *review denied* (Minn. Jan. 24, 2018). They divorced, and a district court order awarded temporary custody of all five children to their paternal aunt. *Id.* On the same day the temporary custody order was issued, Grazzini-Rucki drove two of their children to appellant Deirdre Elise Evavold's home. *Id.* Grazzini-Rucki and Evavold then took the two children to another home, where they stayed for two years until law enforcement discovered them. *Id.* In connection with these events, the state charged Evavold with six counts of deprivation of parental rights, and a jury found her guilty of all six counts. *Id.* Evavold appealed, and this court affirmed her conviction in October 2017. *Id.*[1]

Relevant to the HRO challenged on appeal, Evavold edits and contributes to an internet blog. The district court found that Evavold has the ability to edit any post on the blog. Evavold's blog has commented on criminal and civil cases involving herself and David Rucki and his family. Evavold's blog also has posted general political commentary.

[1] A jury also found Grazzini-Rucki guilty of six counts of deprivation of parental rights. *State v. Grazzini-Rucki*, No. A16-1997, 2017 WL 5077562 (Minn. App. Nov. 6, 2017), *review denied* (Minn. Jan. 16, 2018). She appealed, and this court affirmed the guilty verdicts but reversed and remanded for resentencing. *Id.* at *11.

One of the conditions of Evavold's probation was that "she have no contact" with the Rucki children and that she was prohibited "from referring to the children on social media."

On July 27, 2017, respondents David Rucki and Samantha Rucki filed an affidavit, signed by David Rucki, and a petition for an HRO against Evavold on behalf of themselves and David Rucki's three minor children. Rucki's affidavit stated that Evavold had "engaged in online harassment" of his family by "including false allegations, photos, and identifying information" in her blog. Rucki also averred that Evavold had posted "information about my family, photos of my home, myself and other members of my family," and "ma[d]e allegations that are false but may incite others against me." Rucki also averred that "[m]y children are frightened for their safety and feel their privacy has been violated." The petition requested that Evavold "immediately cease all social media, internet or other mentions of me, my family, children and home."

The next day, the district court signed and filed an ex parte temporary harassment restraining order (THRO) after finding that Evavold had "[m]ade threats to" respondents and the harassment had "a substantial adverse effect on [respondents'] safety, security, or privacy." The THRO ordered Evavold "not name any member of the Rucki Family in any blog posting, social media posting, or internet posting." The order was effective for two years, until July 27, 2019. The THRO stated: "[Evavold] can ask the court to change or vacate the Restraining Order by filing a Request for Hearing within 20 days of the date of service of the petition."

On August 24, 2017, Evavold filed a motion to vacate the THRO. The district court initially scheduled a hearing for September 2017. The hearing was subsequently continued twice, once because Evavold did not serve opposing counsel with her motion.

Respondents filed an emergency motion in December 2017, asserting that a new post on Evavold's blog violated the THRO. Among other things, the post stated that "David Rucki has falsely reported a crime" and included Rucki's home address. In January 2018, the district court granted the emergency motion and ordered Evavold to remove the December blog post.

Respondents filed a second emergency motion in February 2018 and alleged additional violations of the THRO. The motion also asked the court to hold Evavold in "constructive civil contempt" because Evavold "fail[ed] to remove" the December blog post in its entirety. Respondents' motion included an affidavit that attached copies of 18 recent posts from Evavold's blog. The attached posts made numerous allegations against Rucki and accused him of various criminal acts. The posts also included numerous links to other websites that referenced the Rucki family, including the children.

The district court conducted an evidentiary hearing. Respondents relied on the affidavit and copies of the 18 posts from Evavold's blog. Evavold testified that she "removed [Rucki's] address" from the December post but admitted she did not otherwise change the post. In a written order, the district court found Evavold "is in constructive civil contempt" and instructed her to remove the 18 posts. Evavold did not comply with the order, and the district court subsequently issued a warrant for her arrest. She was taken into

custody, but was conditionally released a few days later after the district court found that she was attempting to comply with the court's order.

Evavold filed a second motion to vacate the THRO in May 2018, arguing that the THRO was an "unconstitutional prior restraint" and in violation of the First Amendment. In a written order, the district court denied Evavold's motion to vacate and affirmed the THRO. Evavold appeals.

D E C I S I O N

Evavold argues that the district court erred as a matter of law because it denied her "motion to vacate the order and First Amendment based objections." Evavold contends that her blog posts are constitutionally protected speech and argues that the HRO is unconstitutional as applied to the facts of her case.[2] Whether or not an HRO is constitutional is a question of law that we review de novo. *See Newstrand v. Arend*, 869 N.W.2d 681, 687 (Minn. App. 2015) ("[Appellate courts] review as-applied challenges to the constitutionality of statutes de novo."), *review denied* (Minn. Dec. 15, 2015). Evavold only raises an as-applied challenge on appeal.

Initially, respondents argue that the district court should have rejected Evavold's motion to vacate as untimely. Because the district court did not address the timeliness of Evavold's motion in its written order affirming the HRO and respondents did not file a

[2] In this opinion, we refer to the THRO issued against Evavold as an HRO. When an evidentiary hearing is not timely requested after the issuance of a THRO, the THRO "becomes an ex parte HRO . . . and remains in effect for the period set forth in the ex parte THRO." *Fiduciary Found., LLC ex rel. Rothfusz v. Brown*, 834 N.W.2d 756, 762 (Minn. App. 2013), *review denied* (Minn. Sept. 17, 2013).

notice of related appeal, this issue is not properly before us. Respondents also argue that Evavold failed to provide required notice to the attorney general's office to proceed with her constitutional challenge. *See* Minn. R. Civ. App. P. 144 (providing that a party challenging the constitutionality of a legislative act shall give notice to the attorney general "within time to afford an opportunity to intervene"). No notice, however, is required for an as-applied challenge. *See Welsh v. Johnson*, 508 N.W.2d 212, 215 n.1 (Minn. App. 1993) (providing that appellant's lack of notice to the attorney general of a facial constitutional challenge limited him to "arguing the constitutionality of the statute on an 'as applied' basis"); *see generally Altendorfer v. Jandric, Inc.*, 199 N.W.2d 812, 817 (Minn. 1972) (noting that an as-applied constitutional challenge "may not require" notice to the attorney general under Minn. R. Civ. App. P. 144). We therefore proceed to consider Evavold's constitutional challenge on the merits.

In Minnesota, a district court may issue an HRO if it finds that there are reasonable grounds to believe that a person has engaged in harassment. Minn. Stat. § 609.748, subd. 5(b)(3) (2018). The HRO statute defines harassment, in relevant part, as "repeated incidents of intrusive or unwanted acts, words, or gestures that have a substantial adverse effect or are intended to have a substantial adverse effect on the safety, security, or privacy of another." Minn. Stat. § 609.748, subd. 1 (a)(1) (2018).

The United States and Minnesota Constitutions guarantee the right to free speech. U.S. Const. amend. I; Minn. Const. art. I, § 3. However, the right to free speech is not absolute, and certain categories of speech are unprotected. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 383, 112 S. Ct. 2538, 2543 (1992). In *Dunham v. Roer*, we held that the

HRO statute does not violate the First Amendment because it restricts three categories of unprotected speech: (1) "fighting words," which are "likely to cause the average addressee to fight or protect one's own safety, security, or privacy"; (2) "true threats," which evidence "an intent to commit an act of unlawful violence against one's safety, security or privacy"; and (3) "speech or conduct that is intended to have a substantial adverse effect, i.e., is in violation of one's right to privacy." 708 N.W.2d 552, 565-66 (Minn. App. 2006), *review denied* (Minn. Mar. 28, 2006).

Here, the district court denied Evavold's motion to vacate the HRO after finding that Evavold's conditions of probation were "no contact" with the Rucki children, and that "she was prohibited from referring to the children on social media." The district court then found that Evavold "violated the terms of her probation by posting . . . photos and information about the Rucki family. These postings include many references about . . . David Rucki, and his children." The district court also found that Evavold "has effective control over the postings on the [Evavold's] blog." The court finally found that Evavold's conduct in making her posts was "intended to terrify, threaten and invade the privacy of [Rucki] and his minor children," and concluded that Evavold's conduct was "harassment most evil."

Evavold does not challenge any of district court's findings of fact. She instead makes three arguments, which we will address in turn. First, Evavold argues that her blog posts about the Rucki family do not constitute harassment because the posts do not fall within any of *Dunham*'s three categories of unprotected speech.

The district court's order does not include a detailed constitutional analysis or specifically determine whether the blog was unprotected speech. Instead, the district court stated it considered the constitutional issues raised by Evavold and "finds no merit." But "error is never presumed" on appeal. *See Loth v. Loth*, 35 N.W.2d 542, 546 (Minn. 1949). And, although the district court did not offer a detailed written analysis, the district court did find that Evavold intended her speech to "terrify," "threaten," and "invade the privacy of [Rucki] and his minor children." Under *Dunham*, HROs may restrict invasions of privacy. *See* 708 N.W.2d at 565-66.

Still, Evavold argues that "the record does not suggest that there was a substantial privacy invasion."[3] We disagree. The record contains numerous posts from Evavold's blog about the Rucki family, including allegations of abuse within the Rucki family. One blog post accused Rucki of several criminal offenses and provided the address for the Rucki family's home. The record supports the district court's conclusion that Evavold's conduct was unprotected harassment.

Second, Evavold contends that her blog is "directed to the public at large" as opposed to "one-on-one speech." To support her claim, Evavold cites to two United States Supreme Court cases. *See New York v. Ferber*, 458 U.S. 747, 748, 102 S. Ct. 3348, 3350

[3] Evavold also cites to an unpublished case from this court to support her claim that her posts cannot be invasions of privacy. "Unpublished opinions are not precedential, but they may have persuasive value." *See State v. Ellis-Strong*, 899 N.W.2d 531, 537 (Minn. App. 2017) (citing Minn. Stat. § 480A.08, subd. 3 (2016)). We conclude this unpublished case is not persuasive because the HRO petitioner failed to argue in district court that online posts invaded his privacy, and therefore *waived* the argument on appeal. *See Olson v. LaBrie*, No. A11-558, 2012 WL 426585, at *1-2 (Minn. App. Feb. 13. 2012) ("[W]e conclude that appellant waived his privacy argument."), *review denied* (Apr. 17, 2012).

(1982); *Broadrick v. Oklahoma*, 413 U.S. 601, 601, 93 S. Ct. 2908, 2910 (1973). But these cases refer to the overbreadth doctrine as it relates to enacted statutes that unnecessarily restrict speech. *See Ferber*, 458 U.S. at 748, 102 S. Ct. at 3350; *Broadrick*, 413 U.S. at 601, 93 S. Ct. at 2910. These opinions do not establish a special First Amendment status for publicly-viewable speech. And the fact that speech is posted on the internet "provide[s] no basis for qualifying the level of First Amendment scrutiny." *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870, 117 S. Ct. 2329, 2344 (1997).

Third, Evavold argues that the HRO was an "unconstitutional prior restraint because it prohibited the publication on the internet of any content referring to any of the Rucki family regardless of whether it was harassing and prior to its publication." A primary purpose of the First Amendment is "to prevent previous restraints upon publication." *Near v. Minn. ex rel. Olson*, 283 U.S. 697, 713, 51 S. Ct. 625, 630 (1931). However, the general rule against prior restraints on speech is subject to certain exceptions, including time, place, and manner restrictions. *United States v. Kistner*, 68 F.3d 218, 221 n.7 (8th Cir. 1995).

The HRO did not restrict Evavold from expressing her ideas in general—it restricted her from naming "any member of the Rucki Family" in an "internet posting." In the context of an order for protection (OFP), the Minnesota Supreme Court held that a similar limited restriction on speech was not a prior restraint. *See Rew v. Bergstrom*, 845 N.W.2d 764, 776-77 (Minn. 2014). In *Rew*, the supreme court upheld the constitutionality of an OFP that prevented appellant from communicating with his ex-wife and minor children. *See id.* The court reasoned, first, "an OFP does not prohibit a person from expressing his or her ideas; rather, it requires a person to express those ideas to people other than those protected

by the OFP." *Id.* at 777. Second, the court held that OFPs are not based on the content of speech, but a person's "prior unlawful conduct." *Id.*

We conclude that *Rew* guides our analysis of this HRO. *See id.*; *Anderson v. Lake*, 536 N.W.2d 909, 911 (Minn. App. 1995) (stating that caselaw under the Minnesota Domestic Abuse Act may be recognized in interpreting the HRO statute). Like the OFP in *Rew*, the HRO issued against Evavold restricted her communications about particular individuals based on her prior conduct towards those individuals. While the supreme court in *Rew* remanded for additional factual findings, *id*. at 784-85, Evavold makes no challenge to the adequacy of the district court's findings in this appeal. Thus, based on *Rew*, we conclude that the HRO is not an unconstitutional prior restraint on Evavold's speech.

In sum, we agree with the district court that Evavold's arguments on the constitutionality of the HRO fail on the merits.

Affirmed.